

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

LUCILA BAPTISTE, et al.,  
Plaintiffs,  
v.  
APPLE INC.,  
Defendant.

Case No. [22-cv-02888-HSG](#)

**ORDER GRANTING MOTION TO  
DISMISS**

Re: Dkt. No. 24

Before the Court is Defendant’s motion to dismiss. Dkt. No. 24 (“Mot.”). The Court found this matter appropriate for disposition without oral argument and took the motion under submission. *See* Dkt. No. 31; Civil L.R. 7-1(b). The Court now **GRANTS** the motion.

**I. BACKGROUND**

Plaintiffs bring a proposed class action against Apple, alleging that it unlawfully retained personally identifiable information (“PII”) collected in connection with video streaming rentals on iTunes. *See* Dkt. No. 16 ¶ 1 (“First Amended Complaint” or “FAC”). This information includes names, addresses, credit card information, and rental history. *Id.* Plaintiffs allege that years after renting videos on iTunes, their account histories still displayed the video title, purchase date, and price. *Id.* ¶¶ 10–20. Plaintiffs assert violations of the New York Video Consumer Privacy Act, N.Y. Gen. Bus. Law §§ 670–75, and Minnesota Statute Sections 325I.01–05. *Id.* ¶¶ 69–90.

**II. LEGAL STANDARD**

Federal Rule of Civil Procedure 8(a) requires that a complaint contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). A defendant may move to dismiss a complaint for failing to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6). “Dismissal under Rule 12(b)(6) is

appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory.” *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008).

### III. DISCUSSION

Defendant argues that the state statutes on which Plaintiffs rely do not create a private right of action for *retention* of information—only for wrongful disclosure. *See* Mot. at 7–13. The Court agrees and does not reach the remaining arguments.<sup>1</sup>

#### A. Relevant Law

The New York and Minnesota statutes at issue are nearly identical and prohibit “disclosure of video tape rental records.” *See* N.Y. Gen. Bus. Law § 673; Minn. Stat. § 325I.02. Accordingly, they allow consumers to sue a videotape service provider who “knowingly discloses, to any person, personally identifiable information.” *See* N.Y. Gen. Bus. Law § 673(1); Minn. Stat. § 325I.02(1). These wrongful disclosure provisions explicitly create civil liability. New York’s provision states that a provider who knowingly discloses PII “shall be liable to the aggrieved person for the relief provided in section six hundred seventy-five of this article.” N.Y. Gen. Bus. Law § 673(1). In turn, Section 675, titled “civil liability,” states: “Any person found to be in violation of this article shall be liable to the aggrieved consumer for all actual damages sustained by such consumer s a result of the violation,” and creates a \$500 minimum recovery. Similarly, the Minnesota provision states that a provider who knowingly discloses PII “is liable to the consumer for the relief provided in section 325I.03.” Minn. Stat. § 325I.02(1). Section 325I.03 then states: “The public and private remedies in section 8.31 apply to violations of 325I.02,” and “[i]n addition, a consumer who prevails . . . in an action brought under this section is entitled to a minimum of \$500 in damages.”<sup>2</sup>

<sup>1</sup> Defendant asks for judicial notice of Apple’s terms and conditions and privacy policy. Dkt. No. 24-1. The request is **DENIED AS MOOT** as the documents do not inform the Court’s analysis.

<sup>2</sup> Section 8.31 lists legal violations that the attorney general has a duty to investigate. It also provides for remedies, including damages, for “any person injured” by those violations. Minn. Stat. § 8.31(3a).

In the same section as the wrongful disclosure provision, both statutes have a record destruction provision (i.e., non-retention provision) that states:

A person subject to this section shall destroy personally identifiable information as soon as practicable, but no later than one year from the date the information is no longer necessary for the purpose for which it was collected and there are no pending requests or orders for access to the information under this section.

*Id.* § 325I.03(6); N.Y. Gen. Bus. Law § 673(5) (identical except ending in “information under this article” instead of “section”). Unlike the wrongful disclosure provisions, the non-retention provisions do not mention liability or refer to the civil liability sections.

These state statutes are modeled after a federal law called the Video Privacy Protection Act (“VPPA”), 18 U.S.C. § 2710, enacted in 1988 after a newspaper published Judge Robert Bork’s rental history during his failed Supreme Court confirmation proceedings. *See Rodriguez v. Sony Computer Ent. Am., LLC*, 801 F.3d 1045, 1047 (9th Cir. 2015). The Act contains wrongful disclosure and non-retention provisions nearly identical to those in the state statutes. *See* 18 U.S.C. § 2710(b), (e). Circuit courts have repeatedly found that the Act does *not* create a private right of action for wrongful retention of personal information. *See id.* at 1053; *Sterk v. Redbox Automated Retail, LLC*, 672 F.3d 535, 538 (7th Cir. 2012); *Daniel v. Cantrell*, 375 F.3d 377, 384 (6th Cir. 2004).<sup>3</sup>

## **B. Analysis**

The Court finds that there is no private cause of action for retention of information under either the New York Video Consumer Privacy Act, N.Y. Gen. Bus. Law §§ 670–75, or Minnesota Statute Sections 325I.01–05. The Court’s finding is based on the construction and language of the statutes, as well as the reasoning underlying courts’ consistent refusal to recognize this cause of action under analogous federal law.

Most importantly, although the wrongful disclosure provisions include express language linking the prohibitions to civil liability, the non-retention provisions do not. *Compare* N.Y. Gen. Bus. Law § 673(1) *with* § 673(5) & Minn. Stat. § 325I.02(1) *with* § 325I.02(6). This contrast is

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<sup>3</sup> *Daniel* did not address the VPPA’s non-retention provision, but notably held that “only [the wrongful disclosure provision] can form the basis of liability.” 375 F.3d at 384.

1 meaningful. If the Court were to interpret the non-retention provisions as creating private liability,  
 2 it would strip the liability language in the wrongful disclosure provisions of any purpose. *See*  
 3 *Rodriguez v. Perales*, 657 N.E. 2d 247, 249 (N.Y. 1995) (“It is well settled that . . . we must  
 4 assume that the Legislature did not deliberately place a phrase in the statute which was intended to  
 5 serve no purpose.”); *Allan v. R.D. Offutt Co.*, 869 N.W. 2d 31, 33 (Minn. 2015) (courts must “give  
 6 effect to all of [a] statute’s provisions” so “no word, phrase, or sentence is deemed superfluous,  
 7 void, or insignificant”). Courts have relied on this reasoning in analyzing the federal VPPA. For  
 8 example, the following reasoning from *Rodriguez* applies equally here:

9           The unlawful disclosure provision explicitly provides for liability “to  
 10          the aggrieved person.” However, the unlawful retention provision  
 11          does not specify that a video service provider is liable for the knowing  
 12          retention of personal information. That provision lacks any *mens reas*  
 13          articulation and does not specify any form of available relief to an  
 14          aggrieved party. Instead, the provision simply delineates a statutory  
 15          duty for the “[d]estruction of old records” by the video service  
 16          provider, and does not otherwise provide for civil liability.

17          *See* 801 F.3d at 1050–51; *see also Daniel*, 375 F.3d at 379–80 (finding it “plain” that only the  
 18          wrongful disclosure provision can form the basis of liability because that is the only provision that  
 19          “includes language relating to liability”). In this regard, the New York and Minnesota statutes are  
 20          no different than the VPPA.

21          Other reasons for declining to recognize a private right of action for retention under the  
 22          VPPA also apply to the New York and Minnesota statutes. The *Rodriguez* court noted that  
 23          “[g]enerally, when the language of the statute is directed toward the entity being regulated, rather  
 24          than the party seeking relief, we have not recognized a private right of action.” 801 F.3d at 1051.  
 25          And Judge Posner observed that awarding damages for a violation of the non-retention provision  
 26          would not “make a lot of sense”:

27               How could there be injury, unless the information, not having been  
 28               destroyed, were disclosed? If, though not timely destroyed, it  
              remained secreted in the video service provider's files until it was  
              destroyed, there would be no injury. . . . [L]iquidated damages are  
              intended to be an estimate of actual damages, and if failure of timely  
              destruction results in no injury at all because there is never any  
              disclosure, the only possible estimate of actual damages for violating  
              [the timely destruction provision] would be zero.

1 *Sterk*, 672 F.3d at 538; *see also Rodriguez*, 801 F.3d at 1050. Finally, just like the VPPA, there is  
 2 nothing in the statutes or legislative history that “evinces any . . . intent to create a private right  
 3 of action” for retention. *See Rodriguez*, 801 F.3d at 1051–52. For example, the sponsor memo for  
 4 the New York law repeatedly describes the purpose and effect of the bill as protecting privacy by  
 5 “prohibiting public disclosure of information.” FAC, Ex. A.

6 Plaintiffs argue that (1) the overall structure of the VPPA differs from the state statutes;  
 7 and (2) the statutes’ “civil liability” sections refer broadly to “this section” and “this article.” Dkt.  
 8 No. 27 at 2, 5, 11. First, Plaintiffs are correct that courts have found it meaningful that the  
 9 VPPA’s liability section appears directly after the wrongful disclosure provision but *before* the  
 10 non-retention provision. *See Rodriguez*, 801 F.3d at 1050 (quoting *Sterk*, 672 F.3d at 538). In  
 11 contrast, the states’ liability sections appear at the end of the statute. But the placement of the  
 12 VPPA’s civil liability section was not the courts’ sole basis for finding that there was no private  
 13 right of action for non-retention, and the altered placement here does not undermine the Court’s  
 14 other reasons for finding the same. Overall, the lack of explicit reference to liability in the non-  
 15 retention provisions weighs more heavily than the fact that the liability section comes at the end of  
 16 the statute, which is common. Second, the argument that the liability sections use broad language  
 17 has already been addressed and rejected in the context of the VPPA, which uses the same “this  
 18 section” language in its “civil action” section. *See Rodriguez*, 801 F.3d at 1049–40, 1053 (noting  
 19 that “particular phrases must be construed in light of . . . the whole statutory scheme”).<sup>4</sup>

20 The Court recognizes the difficulty inherent in trying to interpret an apparently novel issue  
 21 of Minnesota and New York state law, since it “can’t grill” either legislature on the question. *See*  
 22 *Sterk*, 672 F.3d at 539. But the statutes’ plain language, considered in light of the case law  
 23 examining the analogous VPPA, supports the conclusion that there is no private right of action for  
 24 retention of personally identifiable information under the New York Video Consumer Privacy Act,  
 25 N.Y. Gen. Bus. Law §§ 670–75, or Minnesota Statute Sections 325I.01–05.

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27 <sup>4</sup> For the New York law, the reference to “this article” makes sense because the statute has two  
 28 separate sections for rental records and sales records, each with its own wrongful disclosure  
 provision. *See* N.Y. Gen. Bus. Law §§ 673, 674.

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